U.S. CHAMBER OF COMMERCE

# Competition & Antitrust Law Enforcement Reform Act (CALERA)

# Exclusionary Conduct

## General Overview

CALERA is far-reaching legislation that would dramatically alter long-established and incredibly important antitrust standards. Under its broad scope, CALERA undermines the consumer welfare approach to antitrust, provides short cuts to rigorous economic analysis, and leads to questionable expanded antitrust exposure for companies fueled by private litigation and treble damages. The Chamber opposes CALERA because of its unwarranted efforts to indiscriminately overhaul the antitrust laws.

CALERA's interest in a sweeping overhaul to the existing antitrust laws is unwarranted. While the case for additional resources for enforcement can be credibly made, there is a lack of evidence that the statutory framework for evaluating antitrust claims is deeply and structurally flawed. Beyond the need for more resources, CALERA fails to identify a specific problem, nor offer a tailored solution. Instead, it offers a blunt overhaul approach that if implemented would upend market-based competition.

The Chamber supports more resources for antitrust enforcement. But changes to antitrust law that would expand enforcement beyond the consumer welfare standard or create short-cuts to rule of reason analysis would harm consumers, our economy, incentives to innovate, and our global competitiveness.

This overview of CALERA examines the exclusionary conduct provisions, while other Chamber overviews examine CALERA's approach to merger review and expansion of liability to include civil fines.

## Antitrust Law Already Proscribes Exclusionary Conduct

Exclusionary conduct is the notion that a firm, usually one that is at least dominant, engages in some behavior that excludes its competition

While the antitrust laws conceivably could proscribe a wide range of conduct that excludes rivals, under current law, the courts evaluate claims of exclusionary conduct based on two

factors. The first is whether the conduct results in harm to the competitive process and consumers – not merely harm to competitors. This is a critical distinction, since aggressive business conduct and unlawful exclusionary conduct both may have the effect of forcing rivals from the market. But the first is often procompetitive, whereas the latter may reduce consumer welfare. Mere protection of *competitors* is not the purpose of the antitrust laws.

The second is whether the harm in question is outweighed by the defendant's procompetitive justifications. This balancing of consideration is known as a "rule of reason" analysis. Where the conduct results in net procompetitive effects, the conduct is not condemned under existing law.

However, antitrust law is often skeptical of exclusionary conduct claims because vigorous competition often inherently excludes or disadvantages competitors – facilitating, supporting, or enhancing the market positions of fellow competitors is fundamentally inconsistent with the very idea of "competition." Further, it is a central tenet of antitrust law that a firm that has become successful on the merits in the marketplace should not be punished for that success, told to stop competing vigorously, or directed to change its conduct in order to support a competitor.

If the antitrust laws took such an approach, they would take on the role of economic regulation and would seek to direct specific outcomes in the market. Correspondingly, there would be little incentive to invest or innovate as any gains from such efforts would have to be shared with other competitors – in other words, companies would be encouraged to free ride off others' efforts.

For example, enforcing property rights generally does not run afoul of the antitrust laws. A dominant firm should not be required to allow its competitor to use its factory, distribution system, or intellectual property. However, there are fact patterns that have been evaluated by the courts where exclusionary conduct can violate the law.

One set of circumstances are referred to as refusal to deal claims, which arise when one firm refuses to work with another firm. However, existing precedent sensibly limits liability to situation where (1) one firm is clearly dominant and (2) the dominate firm terminates a prior, profitable course of dealing with a rival without a procompetitive justification. Under a scenario like this, the current antitrust framework may find such conduct to be a violation.[1]

Importantly, the antitrust laws do not recognize that a firm must enter into a new course of dealing with a competitor, nor do they suggest that changing the terms of a relationship – once established – is by itself an antitrust violation. Instead, using robust economic analysis inherent to the rule of reason the law looks to see whether the net effect of the conduct results in harm to the competitive process. Such an approach to exclusionary conduct is sound and appropriately distinguishes between vigorous competition and conduct designed to harm competition.

In sum, the current antitrust law already considers allegations of exclusionary conduct but examines them carefully under the consumer welfare standard and through a rule of reason

[1] Beyond various forms of refusals to deal the antitrust laws also recognize other types of exclusionary conduct that may form the basis of a claim.

analysis. This process is necessary to distinguish vigorous competition from anticompetitive conduct.

## CALERA's Unwarranted Changes

CALERA looks to move the antitrust framework for evaluating exclusionary conduct away from the rule of reason and economic analysis without offering a valid justification. In doing so, it seeks to make it easier to challenge conduct by a firm that harms a competitor, regardless of whether that conduct benefits consumers or the overall competitive process. To accomplish this, CALERA introduces shortcuts to the economic analysis that has long underpinned the rule of reason and expands antitrust consideration to be focused on the impact on competitors, rather than on competition.

CALERA defines conduct as exclusionary where it presents an "appreciable risk of harming competition" and:

- materially disadvantages **one or more actual or potential competitors;** or
- the conduct tends to foreclose or limit the ability or incentive of **one or more actual or potential competitors to compete.**

This definition is highly problematic because it appears to define prototypically procompetitive conduct as "exclusionary."[2] Lower prices, product improvements or innovation, and improved service all have the effect of "disadvantage[ing]" competitors. Yet the proposed legislation would define these kinds of procompetitive conduct as "exclusionary." That can only have the effect of deterring enhanced competition- the antithesis of the objectives of antitrust.

Accordingly, CALERA leaves in scope a wide range of conduct that might adversely impact a competitor, even where it arguably has procompetitive justifications. CALERA's aim is clearly to discredit and avoid consideration of procompetitive benefits that may arise from conduct that excludes competition.

CALERA also proscribes exclusionary conduct where a person acts alone or in concert with other persons. In doing so, CALERA introduces the concept that a group of companies acting in concert is a violation under the Clayton Act. This is unwarranted and only introduces confusion to antitrust enforcement, as this conduct is adequately covered by Section 1 of the Sherman Act.

Next, CALERA establishes two different paths of liability for those alleged to have engaged in exclusionary conduct, depending on whether the company or group of companies has market power.

### Market Power Path

Under this path CALERA adopts a presumption that "exclusionary conduct" (as define by CALERA violates the law when done by a company that has a

[2] Calera does care out enforcement of intellectual property rights, unless done as a baseless or bad faith action, and it also exempts conduct that is a direct result of compliance with federal or state laws. These limitations are consistent with existing antitrust law.

- “market share of greater than 50 percent as a seller or a buyer in the relevant market;” or
- “otherwise has significant market power in the relevant market.”

Market power is defined as:

- “[T]he ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.”

These presumptions would not apply if the accused firms can establish by a preponderance of the evidence that:

- “[D]istinct procompetitive benefits of the exclusionary conduct in the relevant market eliminate the risk of harming competition presented by the exclusionary conduct;
- “One or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market with the effect of eliminating the risk of harming competition posed by the exclusionary conduct; or
- “[T]he exclusionary conduct does not present an appreciable risk of harming competition.”

**Non-Market Power Path**

Under this path, CALERA captures the alleged exclusionary conduct of **ALL** businesses, regardless of their size or market power, making exclusionary conduct a violation where that conduct creates an appreciable risk to competition based on the “totality of the circumstances” including:

- “the extent to which any distinct procompetitive benefits of the exclusionary conduct substantially eliminate the risk of harming competition presented by the exclusionary conduct; and
- whether one or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market, substantially eliminating the risk of harming competition presented by the exclusionary conduct.”

**Analysis**

Under either path, CALERA tips the scales against the free market actions of competitors in two deeply problematic ways. First, CALERA requires that procompetitive benefits either “eliminate all *risk* of harming competition” or “substantially eliminate the *risk* of harming competition” (emphasis added).

It is troubling that CALERA penalizes a mere risk of harm rather than actual harm. In the case of exclusionary conduct, the conduct has occurred, and as a result there is either harm to the

competitive process or there is not. The "risk to harm" should never be part of a legal standard for conduct that has already occurred, and the harm can be readily identified. This standard is unworkable and imprecise. Any "risk" of future harm is not only speculative, but also can be remedied in and when such harm occurs.

Second, under CALERA, procompetitive benefits need to be shown under the Market Power path to "eliminate" the risk of harm to competition, while under the Non-Market Power Path it must be shown that the procompetitive benefits "substantially eliminate" the risk of ham to competition. Under either test, CAELRA also requires that a cost-benefit analysis produce "distinct" benefit. While it is not entirely clear what "distinct" means here, one possible interpretation is that showing that net benefits outweigh the harms (the current standard) would not be sufficient under this formulation. If this is the intended meaning of this provision, it fundamentally changes the rule of reason approach now used to evaluate such conduct. As a result, businesses will be discouraged from engaging in procompetitive activity on the fat the benefits are not sufficiently distinct to satisfy CALEA's new standard.

Under the Market Power Path CALERA also seeks to draw a clear line from the conduct of firms with a significant market share to a violation of antitrust law when it comes to any type of conduct that is potentially exclusionary. No longer is the burden on the government or the plaintiff to make a case, and as a result companies captured under the Market Power Path effectively must deal with their competitors with undue caution, including potentially providing rivals with access to their business, or be prepared to face endless litigation where they would need to justify their every decision and prove that those actions are sufficiently procompetitive.

Under the Non-Market Power Path, while the burden remains on the government or the plaintiff, companies may violate the law merely where the conduct is deemed to not produce *enough* net benefits or where the risk of future harm may be successfully argued before court. Under either path, if CALERA would become law, antitrust law would become unduly precautionary in its approach, moving away from the current statutory framework of relying on actual harms and putting the courts in the difficult position of needing to identify distinctly beneficial conduct.

These changes fundamentally would deter procompetitive activity and result in a flood of litigation.

**Overturning Reasonable Legal Precedents**

Regardless of the exclusionary conduct paths set forth under CALERA, it also seeks to overturn a range of important legal precedents that have guided the way for our antitrust laws to evaluate exclusionary conduct and conduct in general. CALERA sets out that a violation would not require certain finding that are long-held standards for finding exclusionary conduct:

- *First,* CALERA eliminants the requirement "that the unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.

By doing this, CALERA gives credibility to conduct claims that do not require the company whose conduct is in question to have previously been in a contractual relationship with a competitor, supplier, or distributor. Eliminating that requirement effectively creates a duty for companies to work with other businesses in the marketplace and provide access to their business. Such forced dealing puts courts in the position of being administrative public utility commissions, which is not a desirable function for the courts. Forced dealing also enhances free-riding incentives and serves as a disincentive for innovation.

- *Second,* CALERA removes the requirement "that the defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons."

Here CALERA removes the ability for a business to defend itself by arguing that it treated other competitors, suppliers, or distributors the same way. Eliminating this evidentiary restriction would likely make it easier for rivals to bring claims and will further incentivize free riding and discourage innovation.

- *Third,* CALERA removes the requirements that "any price of the defendant for a product or service was below any measure of the costs to the defendant of providing the product or service" and " a defendant with significant market power in a relevant market has recouped or is likely to recoup the losses it incurred or incurs from below-cost pricing for products or services in the relevant market."

These two findings are relevant to predatory pricing claims. These claims arise when a competitor claims it cannot compete because the price being charged by the firm in question is too low. Often businesses have different cost structures, for this reason the courts have rejected claims where the price in question is above the cost to produce. The courts have also been reluctant to intervene where price is below cost because lowering prices is a key means of enhancing competition and lower prices benefit consumers. For this reason, the courts have also looked to determine whether a company can afford to lose money for a prolonged period of time and whether in the future it is likely it would be able to raise price to recoup losses. Both of these important considerations are rejected under CALERA. This proposal would give less efficient rivals a tool to attack firms that are more efficient.

- *Fourth,* CALERA eliminate the requirement that "the conduct of the defendant makes no economic sense apart from its tendency to harm competition."

With CALERA's removal of this requirement from the law, courts would not be required to determine that there is no economic reason other than to harm competition to justify the actions of the conduct in questions. Eliminating this evidentiary restriction would likely make it easier for rivals to bring claims and will further incentivize fee riding and discourage innovation.

- *Fifth,* CALERA removes the requirement that "the risk of harming competition presented by the conduct of the defendant or any resulting actual harm to competition have been quantified or proven with quantitative evidence."

CALERA's apparent goal here is very straightforward – there would be no need to show actual harm to competition, nor a need to even attempt to measure is. or calculate. CALERA's

insertion of this provision is a crude way of overriding the more sophisticated way the courts look at these questions. In doing so, it makes it very difficult under the rule of reason to evaluate the procompetitive effects against harms on any principled basis. While it can be difficult to quantitively evaluate harms to things like innovation, resorting to qualitive intuitions about how things "should" work is inconsistent with the rule of law.

- *Finally,* CALERA eliminates the requirement that "when a defendant operates a multi-sided platform business, the conduct of the defendant presents an appreciable risk of harming competition on more than one side of the multi-sided platform."

Platforms are marketplaces that attract buyers and sellers. The valuation of the platform to one side depends on the number of members on the side. If the marketplace is unattractive, then there will be a shortage of either buyers or sellers or both. The platform will need to adjust its practices in order to address the shortage, otherwise buyers or sellers will look elsewhere. The operator of a platform may rationally prioritize the welfare of one side of the platform in order to maximize the total welfare of the platform.

Here, CALERA would effectively divorce the interplay between each side of the market. No longer would conduct that is viewed as procompetitive on one side of the market but considered anticompetitive on the other be evaluated for its total impact. Instead, each side of the market would be evaluated separately. Such an approach would not only result in economically inefficient outcomes, but also provide a deep disincentive for companies to operate platform businesses altogether.